



An Artistic Eye: Food Advertisements and Obesity Seen through an Art Historical Critique of Representation

Citation

Emily Balter, An Artistic Eye: Food Advertisements and Obesity Seen through an Art Historical Critique of Representation (April 2, 2012).

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**An Artistic Eye: Food Advertisements and Obesity Seen through an Art Historical
Critique of Representation**

by

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April 2, 2012

This paper is submitted in satisfaction of the course requirement.

Abstract: This paper seeks to demonstrate the powerful influence of food advertisements in the childhood obesity epidemic and thus call into question legal action that eschews placing responsibility on food manufacturers in favor of placing responsibility on the individual. The discussion begins by quickly looking at the Pelman litigation and argues that that it at its core it demonstrates a fundamental misunderstanding of the way in which representation works. This paper will then look at two art historical periods that explore how representation operates and in particular its persuasive capabilities and then use this understanding of representation to analyze current food marketing strategies. It will use Italian Renaissance paintings to demonstrate how artists (or ad-men) can use symbolism and artistic techniques to create works that will speak to the viewer and powerfully communicate a particular message. Next, it will explore Pop Art and contemporary photography's critique of representation, to reveal and deconstruct the ways in which advertisements not only may inform one's point of view, but also may in fact co-opt how one perceives of his/her world.

TABLE OF CONTENTS

I. Introduction	1
II. Pelman Litigation and Personal Responsibility	3
III. Renaissance Art: Painting and The Period Eye	10
A. Guida da Siena, <i>Anunciation</i>	11
B. Follower of Fra Angelico, <i>Virgin and Saint John the Evangelist</i>	13
C. Application to Food Advertisements: Symbolism and Pathos, the Cult of the Fast Food Spokes Character	16
IV. Society of Spectacle.....	20
A. Andy Warhol, <i>Campbell's Soup Cans</i>	20
B. Andreas Gursky, <i>99 Cents</i>	24
C. Application to Food Advertisements: The Food Society of Spectacle.....	26
V. Conclusion	34

I. INTRODUCTION

Childhood obesity in the United States is not simply a health problem but an epidemic.¹ A recent study by the Center for Disease Control and Prevention, revealed that 16.9% of children in the United States are considered obese.² While obesity rates have not risen substantially in the past decade, they present an enormous problem: Dr. David Ludwig, the director of the childhood obesity program at the Children's Hospital in Boston reports that "[c]hildren will be entering adulthood heavier than they've ever been at any time in human history . . . [and] the impact of the epidemic will continue to mount for many years to come."³

Despite its potentially devastating effects, our food law jurisprudence has provided few tools with which to fight the epidemic. In particular, courts have not accepted the argument that food manufacturers should take responsibility for deceptive marketing and their marketing schemes' effects on children. Rather, courts have been sympathetic to the idea that eating habits are a matter best left to the realm of personal responsibility, and not to be adjudicated in the legal system.⁴ This paper seeks to unpack and critically consider the effects of food marketing on children and society at large, in an attempt to show the powerful way in which advertising influences children to eat (and overeat) certain (unhealthy) foods.

¹ See, e.g., Tara Parker-Pope, *Obesity Rates Stall, But No Decline*, NEW YORK TIMES, January 17, 2012, available at <http://well.blogs.nytimes.com/2012/01/17/obesity-rates-stall-but-no-decline/>

² *Id.* (citing data gathered by federal Centers for Disease Control and Prevention)

³ *Id.*

⁴ See *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003) ("*Pelman I*")

Using the (infamous) court case, *Pelman v. McDonald's Corp.*, as a jumping off point, this paper seeks to demonstrate the inadequacy of available legal arguments about food advertising. Specifically, it will call into question both the court's emphasis on personal responsibility and the deficiency in plaintiffs' argument that advertisements were objectively misleading and deceptive in setting forth health claims. Instead, I argue that the problem is not about particular claims regarding healthiness, but about a system of representation and advertising.

This paper will look to models of Art History to develop a vocabulary through which to understand food advertisements and to bring to light the ways in which representation can overtake personal choice. This system employs an artistic vocabulary, which dates at least back to the Italian Renaissance to target children and turn them into consumers. Further, by looking at the critique of representation by Pop Artists and current photographers, we can see that this system of representation functions to disseminate advertisements in a way that prevents viewers from critically assessing their content so that the viewer passively accepts the food manufacturers' promotions. By looking at representation in this art historical framework, I hope to show that food advertisements play a larger role in the obesity epidemic than courts give them credit: food advertisements not only use a particular vocabulary to communicate a particular message tailored to their viewer, but engage with the viewer in such a way as to influence and impact the viewer.

II. PELMAN LITIGATION AND PERSONAL RESPONSIBILITY

In August 2002, plaintiffs—parents on behalf of their overweight young children—commenced a suit claiming that the McDonald’s corporation and various of its affiliates in the New York area engaged in deceptive marketing of its products and that “this deception has caused the minors who have consumed McDonalds’ products to injure their health by becoming obese.”⁵ Plaintiffs claims were under New York General Business Law §349,⁶ were that “the combined effect of McDonald’s various promotional

⁵ *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 516 (S.D.N.Y. 2003) (“*Pelman I*”).

⁶ The plaintiffs’ claims in the *Pelman* litigation evolved over time as the Court required more specificity in certain of their claims and the plaintiffs decided to drop several claims pursuant to their modified case strategy. Plaintiffs originally filed suit in New York State Supreme Court. Defendants removed the case to the Southern District of New York, which granted the defendants’ Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. *See Pelman I*, 237 F. Supp. 2d at 524-43. The Plaintiffs then filed an amended complaint in February 2003, which the district court again dismissed on Rule 12(b)(6) grounds without leave to amend. *See Pelman v. McDonald’s Corp.*, No. 02 Civ. 7821 (RWS), 2003 WL 22052778, at *14 (S.D.N.Y. Sept. 3, 2003) (*Pelman II*). Plaintiffs appealed to the Second Circuit, which reinstated certain of the plaintiffs’ claims, finding that Rule 8(a) was the appropriate pleading standard and that certain claims met that “bare-bones notice-pleading” requirement. *See Pelman v. McDonald’s Corp.*, 396 F.3d 508, 509-11 (2d Cir. 2005) (*Pelman III*). The Second Circuit then remanded the case. *Id.* On remand, the district court required plaintiffs to submit an amended complaint which provided:

- (1) identification of the advertisements about which the plaintiffs are complaining; (2) a brief explanation of why the advertisements are materially deceptive to an objective consumer; (3) a brief explanation of how the plaintiffs were aware of the acts alleged to be misleading; and (4) a brief description of the injuries suffered by each plaintiff by reason of defendant’s conduct.

See Pelman v. McDonald’s Corp., 396 F. Supp. 2d 439, 446 (S.D.N.Y. 2005) (“*Pelman IV*”). The plaintiffs filed a second amended complaint, which the court held fulfilled its previous instruction, contrary to defendants’ renewed motion to dismiss. *See Pelman v. McDonald’s Corp.*, 452 F. Supp. 2d 320, 328 (S.D.N.Y. 2006) (“*Pelman V*”). The plaintiffs then moved for class certification, which was denied on grounds that the cause of action did not meet the predominance requirement and because numerosity was not

representations [that McDonald's used 100% vegetable oil] was to create the false impression that its food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily."⁷ The plaintiffs claimed that they "were aware of McDonald's deceptive practices through their exposure to [McDonald's] advertisements and statements . . . [which] were disseminated in the specified forums of television, radio, internet, magazine, periodical, in-store poster advertisements, and press releases issued in New York State from 1985 and continuing through filing in 2002."⁸ Further, the plaintiffs' "beliefs [regarding the McDonald's products] were affected through their contact and interaction with third-parties, i.e., parents, friends, and relatives, who were influenced by McDonald's allegedly misleading nutritional advertisements."⁹ The plaintiffs claimed that as a result of the deceptive advertising they became "Heavy-Users" (people who eat at McDonalds one plus times per week) or "Super-Heavy Users" (people who at McDonalds four plus times a week).¹⁰

Under New York General Business Law §349, plaintiffs had to show that the advertisements themselves were "objectively misleading or deceptive,"¹¹ in that they "creat[ed] a false impression that its food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily."¹² Plaintiffs focused on the fact that McDonald's

satisfied. *See Pelman v. McDonald's Corp.*, 272 F.R.D. 82, 92-100 (2010) ("*Pelman IV*")

⁷ *See, e.g., Pelman V*, 452 F. Supp. 2d at 322

⁸ *Id.* at 323

⁹ *Id.*

¹⁰ Ashley B. Antler, *The Role of Litigation in Combating Obesity Among Poor Urban Minority Youth: A Critical Analysis of Pelman v. McDonald's Corp.* 15 CARDOZO JOURNAL OF LAW AND GENDER 275 (2009) (citing *Pelman v. McDonald's Corp.*, 452 F. Supp 320 (S.D.N.Y. Dec. 12, 2005) (No. 02 CV 7821))

¹¹ *Pelman IV*, 396 F. Supp. 2d at 445-46

¹² *Id.* at 443.

“‘chose to engage in nutritional campaigns and afford nutritional advice to its consumers’ and there ‘must do so in a truthful manner.’” Further, that McDonald’s assumed a duty “to warn of its products’ processed and unhealthy nutritional content and ingredients” when it “voluntarily decid[ed] to advertise about its products’ health value or ingredients,” as when it “selective[ly] disclosed . . . its switch to vegetable oil for its French fries” and then omitted to advise on harmful products used in its fries.¹³ Thus, the allegations centered on McDonald’s affirmative claims that their products were healthy while not revealing unhealthy aspects of their products.

As the district court in *Pelman I* eloquently stated, at the heart of this case are “[q]uestions of personal responsibility, common knowledge and public health” as well as questions of the “role of society and the courts in addressing such issues.”¹⁴ At the time the case was filed, both the general public and the court indicated that food consumption was a matter of personal responsibility that should not be litigated in our courts. The public largely ridiculed the case, expressing “incredulity at and contempt for the litigious kids—and parents—who won’t take responsibility for a lifetime of chowing down Happy Meals.”¹⁵ The plaintiffs were objects of derision in the press: “The reality is that anyone with an IQ higher than room temperature will understand that excessive consumption of food served in fast-food restaurants will lead to weight gain.”¹⁶ In dicta, the *Pelman I* court asserted that “[m]erely encouraging consumers to eat its products “everyday” is

¹³ Jonathan Benloulou, *Pelman v. McDonald’s: An In-depth Case Study of a Fast Food Obesity Lawsuit*, in *FOOD AND DRUG LAW: AN ELECTRONIC BOOK OF STUDENT PAPERS*, (Peter Barton Hutt, ed., April 2005) (citing plaintiffs’ appellate brief for the Second Circuit), available at <http://leda.law.harvard.edu/leda/data/693/Benloulou05.pdf>

¹⁴ *Pelman I*, 237 F. Supp. 2d at 518

¹⁵ *Id.* at 518 n.5 (internal citations omitted)

¹⁶ *Id.* (citing Neil Buckley, *Big Food faces grilling over America’s obesity ‘epidemic,’* FINANCIAL TIMES, Nov. 27, 2002 (internal citations omitted))

mere puffery, at most, in the absence of a claim that to do so will result in a specific effect on health.”¹⁷

In denying class certification, the court in *Pelman VI*, in part rested on the idea that individualized assessments had to be made as to whether “each plaintiff rel[ied] upon McDonald’s misrepresentations about its foods when deciding to eat there.”¹⁸ The court agreed with the defendant that “[a] person’s choice to eat at McDonald’s and what foods (and how much) he eats may depend on taste, past experience, habit, convenience, location, peer choices, other non-nutritional advertising and cost”¹⁹ and thus that whether or not the Plaintiff’s claim “that they ate McDonald’s food because they believed it to be healthier than it was in fact,” must be determined for each particular person and “requires individualized proof.”²⁰

The court’s focus on the individual influences that led each plaintiff to eat at McDonald’s is of particular interest and misguided. For starters, plaintiffs admitted that their decisions to eat at McDonald’s were influenced by third parties, in other words, factors other than McDonald’s misstatements. Important, as the plaintiffs realized but the court did not, those third party influences cannot be understood as separate from McDonald’s advertisements. While perhaps not directly attributable to McDonald’s, those statements should be understood as informed or influenced by McDonald’s. That is, the problem is not that the McDonald’s advertisements do not exist in a vacuum, but

¹⁷ *Id.* at 527

¹⁸ A. Bryan Endres & Nicholas R. Johnson, *United States Food Law Update: The FDA Food Safety Modernization Act, Obesity and Deceptive Labeling Enforcement*, 7 J. FOOD L. & POL’Y 135, 141-42 (2011) (citing *Pelman VI*, 272 F.R.D. at 93-95)

¹⁹ *Pelman VI*, 272 F.R.D. at 95 (alterations in original) (quoting Def.’s Mem. In Opp’n Class Cert. 13 (citing Def.’s Mot. To Strike, Aff. Timothy P. Meyer ¶¶ 2, 4-9, 18))

²⁰ *Id.* at 94

that the third party sources do not exist in a vacuum. Thus, while the plaintiffs' individual circumstances influence how each plaintiff understands McDonald's advertisements, the advertisements inform and shape the individual circumstances. As Lewis A. Segall wrote in a letter to Peter Barton Hutt, the FDA is "charged with regulating a part of society which is fraught with non-rational cultural attitudes, prejudices and allegiances."²¹ Thus, "food regulation . . . operates in a world of cultural meanings . . . [and an] accounting for culture may give a fuller account of the dynamics of regulatory policy."²²

Second, the court's ideas about personal responsibility ignore the ways in which advertisements do not simply reflect but shape preferences and that notions of personal responsibility may be overcome in a world in which we are constantly confronted with advertisements. Part of the problem here is that the plaintiff's arguments focus on deception: that McDonald's holds itself out to be healthier than it really is. This argument is unavailing to those who think that the viewer of those advertisements should be able to see through such a claim, particularly since under FDA guidelines whether or not a food label is misleading is judged under the "reasonable consumer standard,"²³ and not "the ignorant, the unthinking and the credulous."²⁴ However, the problem is perhaps less "deception"—that McDonald's touts its use of healthy products while still using fattening ingredients—and more that McDonald's (and companies like it) use marketing

²¹ Letter from Lewis A. Segall to Peter Barton Hutt (Apr. 12, 1990)

²² *Id.*

²³ 67 Fed. Reg. 78002, 78003 (Dec. 20, 2002)

²⁴ See, e.g., *United States v. Article . . . Consisting of 216 individually Cartoned Bottles, of an Article Labeled in part: Sudden Change*, 409 F.2d 734 (2d Cir. 1969)

that encourages consumers, particularly children, to buy their product, whether it is healthy or not.

While the courts have been hesitant to acknowledge the role of advertisements in the obesity epidemic, public health experts have long argued that “the marketing of energy-dense, low nutrient food products to children and adolescents is one of many factors contributing to the obesity epidemic.”²⁵ While acknowledging that “a causal link between marketing and increasing childhood obesity rates has yet to be firmly established,” recent research has indicated advertising’s strong influence on food choice, particularly for children who “have difficulty distinguishing between television programming content and advertising, or comprehending the purpose of advertising.”²⁶ Public health experts have also noted that food and beverage companies, restaurants, food retailers, trade associations, media sources and the government are all “[k]ey actors” in influencing children’s food choices and in the obesity epidemic.²⁷

This paper however seeks to challenge the *Pelman* court’s seemingly strong allegiance to the idea that food intake should be one’s personal responsibility, and that obesity shouldn’t be blamed on society or policed by the courts.²⁸ To do so, this paper looks at the power of representation to convince and persuade by looking at key periods in the History of Art in which artists developed a vocabulary with which to communicate

²⁵ WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY REPORT TO THE PRESIDENT 28, May 2010 [hereinafter White House Task Force Report] *available at* http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf (“White House Task Force Report”);

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See, e.g., Pelman I*, 237 F. Supp. 2d at 518

and influence their viewers and in which artists sought to expose and critique the use of representation as propaganda.

III. RENAISSANCE ART: PAINTING AND THE PERIOD EYE

From the medieval to the renaissance period, there was a fundamental shift in the function and purpose of art. In medieval times the primary function of sculpture and painting was to please God: artistic works were for God to admire and take pleasure in and communicated the people's religious devotion. Thus, a typical gothic church from that period would be cluttered with sculptures, which were placed without regard to whether the worshiper could see them or not. In contrast, in the Renaissance period the human viewpoint—what everyday members of society saw—took precedent when determining how artists created and displayed their work. For example, in 1408 Donatello constructed a six-foot tall marble statue of the David that, which Donatello initially planned to display on the balustrade of the Florence Cathedral. However, when it was determined that passers by could not see the life size figure, it was moved to a place where the public could easily view it. Unlike the art of the medieval period, the David was moved because it was more important for the citizens of Florence to see it than it was for God to see the sculpture. Thus, the key to understanding Renaissance art is in locating the devices artists used to communicate with their *human* audiences.

This paper will look at two works to explore the ways through which artists in the Renaissance period developed techniques to communicate to their viewer through art, particularly in a religious context. While paintings of food were not prevalent in the Renaissance period, the ways in the clergy used religious art in their churches to communicate with their congregation provides an interesting context for understanding the ways in which food manufacturers use advertisements today to communicate with

consumers.²⁹ Religious art was intended to speak to the layman in order to serve the purposes of the clergy: its ultimate purpose was to make God and the church more accessible to the viewer.³⁰ Similarly, food advertisements employ the techniques used to do this to convince consumers to buy their product.

A. Guida da Siena, *Annunciation*, 1250-1300, Sienna (Figure 1)

Guida da Siena's annunciation is an early example of the means through which artists communicated the messages of the clergy to their viewers through a language of colors, poses, and shapes. Specifically, Guida uses well-known and easily recognizable symbols to tell a story to the worshipper. Further, through the way he paints the work, Guida begins to be able to elicit a particular feeling or emotion.

The annunciation scene depicted here is one to which the typical renaissance viewer would have been very familiar, particularly since its intended viewers were habitants of Sienna, a city dedicated to the Virgin. The painting is one in a series of "five successive spiritual and mental conditions or states attributable to Mary," when the angel appears to her.³¹ The viewer would have recognized Mary from her blue robe and red dress, and similarly would have recognized the angel Gabriel because of his large multi-colored wings. Similarly, the use of specific poses enables the viewer to pinpoint this moment in the annunciation story; Guida depicts Mary with her body turned away from

²⁹ One could say that food is as important in our society today as religion was in the Renaissance period!

³⁰ See generally, Michael Baxandall, *PAINTING AND EXPERIENCE IN FIFTEENTH-CENTURY ITALY: A PRIMER IN THE SOCIAL HISTORY OF PICTORIAL STYLE* (Oxford University Press 1988). Baxandall wrote on the concept of the "period eye," which explains how art in the Renaissance period was intended to communicate a certain message to its viewer and how societal and cultural norms shaped the way in which viewers' understood the art to which they were exposed.

³¹ *Id.* at 51

the angel, and with her right hand at her chest as if she is overwhelmed, a pose that was commonly used to depict Mary in a state of disquiet.³²

Thus, the painting is deciphered through the understanding of certain norms and symbols. However, unlike the altarpiece discussed below, Guida's work lacks some of the stylistic advances that allowed later painter's not only to convey a coherent narrative to their audiences, but also to truly engage with viewers and draw viewers into the world depicted. For example, Guida's painting lacks proper perspective and the picture plane is fractured, making it difficult for the viewer to follow the narrative of the painting. The Angel Gabriel and Mary seem to exist in different realms and it is difficult to make out how they are connected to one another. Similarly, while Mary's contorted pose would mean something to the educated viewer, the fact that her body and face point in different directions makes it difficult to make out her relationship and reaction to the angel. Further, while Guida's Mary and Angel Gabriel lack the naturalism and three-dimensionality Renaissance artists later began to master. Thus, Guida is unable to communicate the most salient message—that Mary is being filled by life—because his figures are flat and lifeless. Moreover, because Mary's figure is lifeless and unnatural, the viewer, most part, cannot relate to, and thus cannot penetrate, the world the painting seeks to recreate.

Still, the painting is not entirely impenetrable as Guida begins to employ techniques that draw the viewer into the world of the painting. Through the use of certain motifs, shapes, and colors, Guida begins to engage the viewer in the story of the annunciation such that the painting functions like a sermon, and "preacher and painter . . .

³² See, e.g., Fillipo Lippi, *The Annunciation of Florence*

[were] repiteur to each other.”³³ Guida uses intense colors and a flurried brush stroke to not only convey Mary’s state of mind, but also elicit a similar intensity of feeling in the viewer, heightening the import of this moment. The swirling bright colors mimic the zeal of the preacher’s address and instill in the congregation the same fervor as might a religious sermon.

B. Follower of Fra Angelico, *Virgin and Saint John the Evangelist*, 15th Century, Florence (Figure 2)

In the fifteenth century, artists were better able to communicate to viewers through religious art in a way that transported them from their secular realm into the spiritual world the work depicts. Paintings like this altarpiece, created by a follower of Fra Angelico, were constructed so as to help viewers gain a closer relationship to God. This was especially important for an altarpiece, which was arguably the central and most conspicuous object in the church. Because they were so prominently displayed to the congregation, what the altarpiece communicated, and how it communicated with the viewer, was especially important. A successful altarpiece linked the profane and the spiritual space, connecting the viewer—the layperson—to the church and involving them in the drama painted before them. These paintings, which were two sides of an altarpiece whose central panel would have depicted the crucifixion, are strong examples of how art works engage with the viewer and connect the space of the viewer with the holy scene.

Religious art was meant “[f]irst, for the instruction of simple [illiterate] people, because they are instructed by them, as if by books [and] [s]econd, so that the Mystery of the Incarnation [of Christ] and the examples of the Saints may be more active in our

³³ Baxandall, *supra* note 26, at 49

memory through being presented daily to our eyes.”³⁴ As in Guida’s work, the artist here uses a pictorial vocabulary that the “public was equipped to recognize” to convey what is happening in the scene, to tell the viewers who the figures are, and to help the viewer to interpret the piece of art.³⁵ Here again, the traditional blue robe and red dress indicates to the viewer that the female figure is Mary. Further, the artist uses bodily to communicate a particular state of mind.³⁶ Mary’s clasping of her hands to her chest communicated that she was grieving and similarly St. John’s holding his hand to his face communicated melancholy.³⁷ This would instruct the viewer that he should have a similar reaction to the crucified Christ.

Here however, the artist goes beyond symbolic instruction or coding, and uses the body as a medium through which actual emotion is expressed,³⁸ using naturalistic rendering to create a connection with the viewer, thereby pulling the viewer into the action. In this way, the altarpiece achieves the third function of religious painting: “to excite feelings of devotion, these being aroused more effectively by things seen than by things heard.”³⁹ Paintings were sought to combat congregants “emotional sluggishness so that men who are not aroused to devotion when they hear about the histories of the

³⁴ *Id.* p. 42 (quoting Giovanni da Genoa in *Catholicon* (c. 1290))

³⁵ *Id.*

³⁶ Leon Battista Alberti, an artist who also wrote treatises on painting and architecture in the Renaissance period that deeply influenced his contemporaries, stated that “feelings are known from the movements of the body.” Leon Battista Alberti, *ON PAINTING* 78 (Cecil Grayson trans., Penguin Classics 1991)

³⁷ Baxandall, *supra* note 26, at 42

³⁸ *See id.* at 76

³⁹ Baxandall, *supra* note 26, at 41 (quoting Giovanni da Genoa in *Catholicon* (c. 1290))

Saints may at least be moved when they see them, as if [they were] actually present, in pictures.”⁴⁰

The panels here are striking in their naturalistic depictions of Mary and St. John. While the figures are covered in heavy drapery, the artist is able to convey volume and weight in the figures’ bodies and clothes. Further, he paints their skin pink and smooth, so that it seems real and touchable. Unlike how viewers would react to Guida’s figures, whose skin is an unrealistic grayish green and whose bodies are stylized and contorted, the congregants look at the Mary and St. John depicted here as if they were real people just like them, even in spite of their halos. The figures’ faces display clear agitation and despair yet at the same time appear generic and lack distinguishing features. By depicting their faces in this way, the viewers not only can discern the figures’ emotion, but also, because the figures’ faces are generic, the viewer is able to impose his/her own image onto it and thus align him/herself with the conveyed emotion. This not only makes the depiction more real and tangible, but also more memorable. The altarpiece thus has pathos to it; it is able both to express and evoke interior emotional states.

Important, the realistic depiction not only draws the viewer into the pictorial space, but also conveys a spiritual message: the emphasis on the human part of Christ’s sacrifice reminds the viewer what Christ did for them. The naturalistic rendering heightens the viewer’s experience such that the painting doesn’t merely tell a story, but instructs the churchgoers on how to feel. Further, while they are separated on different sections of the altar, their visceral emotions link Mary and St. John both to each and other

⁴⁰ *Id.* (quoting Fra Michele da Carcano); *see also* John Francis Moffitt, *PAINTERLY PERSPECTIVE AND PIETY: RELIGIOUS USES OF THE VANISHING POINT, FROM THE FIFTEENTH TO THE EIGHTEENTH CENTURY*, (McFarland and Company, Inc. 2008)

and to the central crucifixion scene. Through them, the viewer has access to, and experiences, this most important religious moment. These figures are thus intercessors between the human viewer and this holy moment. The image of the altarpiece was the image churchgoers left with when they exited the chapel. This altarpiece, with its skillful naturalism relates Christ's sacrifice to the human world and instructs the congregation to gravely lament the crucifixion, emulating St. John and Mary.

C. Application to Food Advertisements: Symbolism and Pathos, the Cult of the Fast Food Spokes character

Like the Italian Renaissance painters, food and beverage companies use recognizable symbols to communicate to their audiences. As in the paintings that used certain colors and poses to convey a certain message to the viewer, food manufacturers use recognizable symbols to influence food choices. In particular, researchers have used particular symbolic content to target children.⁴¹ In using such food symbols, food manufacturers find a way to relate to potential consumers and inform what we might think otherwise think of as "personal choice." For example, researchers conducted a study in which they offered preschoolers the choice between eating a Hershey's bar or broccoli.⁴² Initially, 78% of the preschoolers chose the chocolate bar, while the

⁴¹ David Darwin, *Advertising Obesity: Can the United States Follow The Lead of the United Kingdom in Limiting Television Marketing of Unhealthy Foods to Children*, 42 VAND. J. TRANSNAT'L L. 317, 342 (2009) (internal citation omitted)

⁴² White House Task Force Report, *supra* note 21, at 29; Jillian Harris et. al., *Marketing Foods to Children and Adolescents: Licensed Characters and Other Promotions on Packaged Foods in the Supermarket*, 13(3) PUBLIC HEALTH NUTRITION, 409, 417 (2009), [hereinafter *Licensed Characters*]

remaining 22% chose the broccoli.⁴³ However, when researchers then gave these same preschoolers the choice of eating broccoli with an Elmo sticker and a plain Hershey's bar, 50% of the preschoolers choose the broccoli.⁴⁴ Further, when researchers then placed the Elmo sticker on the Hershey's bar, eighty-nine percent of the preschoolers chose the Hershey's bar and only 11% choose the broccoli.⁴⁵

This study explains the widespread use of spokes characters by food manufacturers,⁴⁶ which are "animated versions of animals, people, or even the food itself," and which are "generally associated with a particular product or product line."⁴⁷ Like Elmo or the use of a particular color or pose in Renaissance art, these spokes characters help the consumer identify a particular type of food. Moreover, food manufacturers often provide "fictitious biographical information" about the characters that "appear[] in television ads, on packages, and in online videos," which are "augmented by websites that use the characters in games, afford children the opportunity to help them solve problems or mysteries, and offer related prizes or premiums."⁴⁸ In this way, the spokes characters are associated with fun and playing. Like the Renaissance viewer knew to associate Mary's gesture as portraying grief, the consumer knows that

⁴³ White House Task Force, *supra* note 21, at 29; Harris, *Licensed Characters*, *supra* note 37, 416; Angela J. Campbell, *Restricting the Marketing of Junk Food to Children by Product Placement and Character Selling*, 39 LOY. L.A.L. REV. 447, 489 (2006)

⁴⁴ White House Task Force, *supra* note 21, at 29; Harris, *Licensed Characters*, *supra* note 37, 417; Campbell, *supra* note 38, at 489

⁴⁵ Campbell, *supra* note 38, at 489

⁴⁶ See Judith A. Garretson & Ronald W. Niedrich, *Spokes-Characters: Creating Character Trust and Positive Brand Attitudes*, 33 J. ADVERTISING 25, 25 (2004)

⁴⁷ Federal Trade Commission, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*, Washington D.C.: Federal Trade Commission, at ES-5, 48 (2008) [hereinafter FTC Report], available at <http://www.ftc.gov/os/2008/07/P064504foodmktingreport.pdf>

⁴⁸ FTC Report, *supra* note 42, at ES-5, 38

this character represents certain positive values, such as “fun” provided by the biographical information this character, and thereby associates the food product with “fun.” Further, like later Renaissance paintings included color and modeling to evoke “pathos” and elicit emotion, advertisements featuring spokes characters often “include[] bright or contrasting colors,” as well as “graphics suggesting speed or explosiveness . . . athleticism [and] energy.”⁴⁹

This technique is exemplified by McDonald’s spokes character, Ronald McDonald. Ronald is outfitted in an extremely bright yellow jumper with the McDonald’s insignia over red and white striped pants and shirt. He wears bright yellow gloves and bright red shoes with yellow laces and has a mop of bright red hair. Ronald is almost always shown in motion, is sometimes waving, and with a big smile on his face. In a recent ad campaign he is shown “dancing, playing soccer, [and] shooting hoops.”⁵⁰ McDonald’s global chief creative officer, Marlena Peleo-Lazar, states that “Ronald’s job is to promote joy, fun and the spontaneity of the brand.”⁵¹ Peleo-Lazar elaborated on this goal stating that, “[Ronald McDonald] never does a hard sell.”⁵² Indeed, it is because Ronald McDonald “promotes joy,” that he is making a “hard sell.”

In a commercial aired first on April 6, 2011, not only does Ronald convey a happy and exciting mood to children, but also he asks them to imagine themselves with him. Just like the Renaissance artist gave his figures plain faces so that the viewer could graft their own face onto the painting, “a chatty Ronald greets folks on the street and

⁴⁹ *Id.* at 44

⁵⁰ Bruce Horovitz, *Ronald McDonald is reaching out to kids online*, USA TODAY, Mar. 31, 2011, available at <http://www.usatoday.com/money/industries/food/2011-03-31-ronald-mcdonald-goes-digital.htm>

⁵¹ *Id.*

⁵² *Id.*

poses with them for photos in an empty picture frame that he's carrying," while an off-screen narrator states "You can picture yourself with Ronald at Happymeal.com."⁵³ The consumer is not only made to feel a certain way by advertisements featuring Ronald McDonald, but directly connects with Ronald McDonald and can make himself a part of the action on the screen.

⁵³ *Id.*

IV. SOCIETY OF SPECTACLE

In Renaissance art, artists found a way to forcefully communicate their messages to the passive viewer. The paintings not only use the viewer's knowledge of poses, symbols and iconography to convey a particular state of affairs, but also transmit messages or a particular feeling to a passive observer. The works discussed below, by Andy Warhol, the iconic figure of pop art, and Andreas Gursky, a contemporary photographer, critically explore this power of art. Both movements explore and challenge the way representation functions within culture in advertisements and mass media. Specifically, these artists look at the role of representation in a world overrun with advertisements, dubbed "The Society of Spectacle," by theorist Guy Debord. In the works selected below, Warhol paints Campbell's soup cans as an example of how in the "Society of Spectacle" a viewer of advertisements "recogniz[es] his own need in the images of need proposed by the dominant system" and thus ceases to understand "his own existence and his own desires."⁵⁴ Similarly, Gursky photographs a 99 cent store filled with food products to make an implicit critique of the ways in which our society creates representation that blur the line between what is real and what is an advertisement.

A. Andy Warhol, *Campbell's Soup Cans*, 1962 (Figures 3 & 4)

In 1962, Warhol made thirty-two separate paintings of Campbell's soup cans, representing every flavor sold by Campbell at the time. He made each painting by

⁵⁴ Guy Debord, *Separation Perfect*, in *THE SOCIETY OF SPECTACLE* 23 (Donald Nicholson Smith trans., Zone Books, 1994)

tracing a Campbell's soup ad from a magazine onto a pre-stretched canvas.⁵⁵ The paintings are made to look exactly like the mechanically produced advertisements: Warhol's brushstroke is virtually imperceptible and the cans are marked by their "hard edges, planes of pure color, and sharp, stylized reflections."⁵⁶ Hung one after another in an eight by four grid, each canvas looks exactly the same and indistinguishable.

However, each canvas is unique and bears marks of that fact that it is an exact replica of the actual soup can and has been made and designed by Warhol, an artist. While the labels identifying the flavor of each soup look as though they have been stenciled, when examined closely they are irregular and retain an idiosyncratic flair. While Warhol traced ads to create his paintings, the outline of the cans is not a smooth line but differs in thickness and is not perfectly straight. The fleur-de-lis type designs at the bottom of the cans are not uniformly done: each design takes on a slightly different form and they differ in thickness, as Warhol painted some with a light touch and painted others with a saturated brush. Not only does Warhol vary thickness and size of the design on each can, but does not do so in a uniform fashion from can to can. Some of the variation is caused by Warhol's decision to use an unprimed canvas, such that the "canvas' texture is discernable," rather than "prime[] the painting surface to conceal its warp and weft": "[t]he visibility of the material points out that the images, though reproductions of advertisements, are still paintings," bearing the mark of their creator.⁵⁷

⁵⁵ Elizabeth Athens, *Andy Warhol's Production Kitchen*, 9(2) GASTRONOMICA: THE JOURNAL OF FOOD AND CULTURE 45, 46 (2009)

⁵⁶ *Id.* at 46-47

⁵⁷ *Id.* at 47

Further, Warhol's paintings differ from the actual advertisements as he has used a simple gold disk in place of Campbell's detailed seal.⁵⁸

By hanging the paintings one after another, the uniqueness of each painting becomes imperceptible: as the image of the soup can is repeated over and over, they blur together such that the viewer loses the ability to unpack the representation and instead passively absorbs it. Each separate image is emptied of the authorial expressivity, and the differences and individual markings are drowned out by the sheer proliferation of the images. The viewer forgets that Warhol has crafted these images and instead sees them as representing reality. We forget they are a painting—a representation of reality that has been mediated by Warhol's interpretations—and see them as perfectly replicating the actual product. By exploring this fusion of art and life,⁵⁹ Warhol demonstrates that representation has become our reality. Warhol reveals that in a world imbricated in representation, images become substitutes for the real and a person's experience of the world is mediated by representation.

Warhol deepened this critique two years later with *American Supermarket*, in which he took over a gallery space and turned it into a virtual supermarket,⁶⁰ “with signs

⁵⁸ *Id.*; Cecile Whiting, *A TASTE FOR POP: POP, ART, GENDER, AND CONSUMER CULTURE* 45 (Cambridge University Press, 1997)

⁵⁹ It is interesting to note that Warhol's project was itself a fusion of art and life. Warhol stated that he started painting soup cans “[b]ecause [he] used to drink it,” explaining that he “used to have the same lunch every day[,] [Campbell's soup], for twenty years, I guess, the same thing over and over again. Someone said my life dominated me . . .” *POP ART REDEFINED* 116-19 (Gene Swenson, John Russell and Suzi Gablik eds., 1963) (quoting Andy Warhol) (citing *What is Pop Art? Interviews with Eight Painters (Part I)*, *ART NEWS*, Nov. 1963 (quoting Andy Warhol))

⁶⁰ Warhol's “supermarket” seems to draw on an earlier work by his contemporary Claes Oldenburg. In *Store* (1961-1962), Oldenburg took over a storefront on 107 East Second Street and filled it with painted sculptural replicas of everyday objects including many food items. Oldenburg stated that his purpose was to turn something functional into

denoting aisles for eggs, fresh fruit, and bread, as well as freezer sections and stacks of canned goods.”⁶¹ He stocked the aisles with replicas of food, and hung paintings mimicking advertisements—including a larger version of his Campbell’s soup can—on the walls. Visitors to the gallery were encouraged to walk around and interact with the products. In one image taken of gallery viewers, “a gallery visitor stands beneath a Warhol painting while examining a can of soup . . . suggest[ing] that the patrons could be so distracted by the environment that they believed they were in a supermarket rather than an art gallery.”⁶²

In this way, Warhol enacts the system of spectacle culture, using his image to control his viewer and shape the way the viewers perceives of his/her world. His work illustrates the way in which advertisements today have a “performative” function: they not only project a certain experience or feeling but involve the viewer in it so that the viewer experiences representation as reality. The viewer interacts with the representation and ultimately consumes it. The ability of a representation to have this effect is best explained by J.L. Austin’s theory of performativity in *How to Do Things with Words*, in which he shows that “the uttering of [a] sentence is, or is a part of, the doing of an action.”⁶³ For example, the words “I do,” when exchanged by two people in front of a

something to be looked at, consumed only by the eyes. Jan McDevitt, *The Object: Still Life*, CRAFT HORIZONS 31 (1965) (citing Claes Oldenburg) (reprinted in Richard Shiff, *Judd through Oldenburg*, TATE PAPERS (2004)). Warhol furthers this critique by showing that the “something to be looked at, consumed only by the eyes,” informs what we think of as functional.

⁶¹ Athens, *supra* note 50, at 47

⁶² *Id.*

⁶³ J.L. Austin, *Lecture I*, in HOW TO DO THINGS WITH WORDS 5 (J.O. Urmson & Marina Sbisa eds., Harvard University Press, 1962) (1975)

priest, functions so that they become wed to one another.⁶⁴ In contrast words like “this is a tree” simply “describe some state of affairs, or . . . state some fact.”⁶⁵ Like the words “I do,” Warhol’s supermarket does not simply depict a scene but transforms the viewer into a consumer who wants to possess what is represented.

B. Andreas Gursky, *99 Cents*, 1999, C-Print (Figure 5)

Created three decades later, Gursky’s work builds on Warhol’s critique of representation⁶⁶ in age where we are increasingly unable to differentiate between what is a mere representation and what is reality. Gursky’s photograph, *99 cents*, demonstrates that representation is both manipulative and manipulable, and that what purports to be a document of reality is often artificial and constructed. This iconic photograph is an imposing presence at 43.2 x 61.6 cm even though it depicts the most ordinary of subjects, a 99 cent store, with shelf upon shelf of packaged food products. The enormous size makes the photograph life-like, as if the viewer is at the market. This realism, which makes the viewer feel as if he is part of the scene, gives the impression that Gursky simply went to a 99 cent store and snapped this photograph.

However, as the viewer takes in the image, s/he is drawn to its artificiality. First, the viewer notices “that the perspective we are offered would not be available were we physically on location . . . [w]e wouldn’t be able to confront that conglomerated mass of

⁶⁴ *Id.*

⁶⁵ *Id.* at 1

⁶⁶ It should be noted that this reading of Warhol as critical of spectacle culture and the role of representation is only one interpretation of his work, which Warhol himself eschewed. As Art Historian Hal Foster writes, “the reading of Warhol as empathetic and engaged is a projection, but so is the account of Warhol as superficial and impassive.” Hal Foster, *Survey*, in POP 15, 30 (Mark Francis ed., Phaidon 2005)

products with one sweeping, reflective glance.”⁶⁷ Similarly, the color scheme is bizarre. The colors of the food packages are extremely saturated and we notice that Gursky only uses a handful of colors and that these exact colors are repeated on different products. For example, the blue-ish green color of the candy bars at the far left is the exact same shade as are the 99 cent signs, the shirt of a cashier in the far back, and the stripes on the shirt of the man closest to the foreground. Similarly, while the food products and signs are crisply displayed, the structure of the building—specifically the polls and the supermarket shelves—look as if their edges have been blurred. Further, we notice that the ceiling seems to reflect the products on the shelves as if it were a mirror, which does not feel accurate. Moreover, the ceiling seems to lose form, and as our eye moves back on the picture plane it becomes a pixilated mess and seems to seep downward on the walls unnaturally. While we assume that a photograph depicts reality, it becomes clear that “the final image has been altered.”⁶⁸

By playing on the assumption that the photograph captures reality, and then undoing that assumption by exposing its artificiality, Gursky reveals that what we see is simply a construct. Gursky has not taken a picture of reality but has aestheticized to depict a world that although it initially feels real and familiar has no origin in reality; the work is not “an inherently transparent representation but rather the crafted product of staging . . . and editing.”⁶⁹ Gursky has taken this everyday moment and presented it through a medium—photography—that is supposed to be an index of reality. However, his digital distortions reveal that what the viewer initially perceives as real has been

⁶⁷ See Kyra Kordoski, *Andreas Gursky*, WHITE HOT MAGAZINE, available at <http://whitehotmagazine.com/articles/andreas-gursky-vancouver-art-gallery/1893>

⁶⁸ *Id.*

⁶⁹ Marcia E. Bertocq, *Rules of Engagement*, ART IN AMERICA 168 (June/July 2008)

constructed. Gursky seeks to use the photograph to wake up the viewer, to overcome our passive acceptance of representations in today's society.

C. Application to Food Advertisements: The Food Society of Spectacle

At the time of his critique of the 1960s culture of consumption, Warhol likely could not comprehend the forms of advertising, and the amount of advertising, we encounter in today's world. Studies report that "commercialism and consumerism pervade the daily life of young children to an extent that is far greater than that experienced by previous generations."⁷⁰ In a study conducted by the FTC in 2006, forty-four major food and beverage companies reported spending \$1,618,600,000 to promote their products to children and \$9.6 billion to promote their product to all audiences.⁷¹ Fifty-three percent of these expenditures went to traditional forms of marketing, such as television, radio, and print advertisements.⁷² The remaining forty-seven percent of expenditures, "new media" took myriad forms.⁷³ Companies not only post traditional advertisements on the internet, but also set up "advergaming," video games that prominently feature a food brand, in-school marketing, as well as podcasts and "webisodes," again prominently featuring the brand.⁷⁴ Further, companies use cross-promotions, product placement on popular television shows and movies and "popular

⁷⁰ Darwin, *supra* note 37, at 342 (internal citation omitted)

⁷¹ FTC Report, *supra* note 42, at ES-1; *see also* Jillian Harris et. al., *A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can Be Done*, 30 ANNUAL REVIEW OF PUBLIC HEALTH 211, 214 (2009) [hereinafter *A Crisis in the Marketplaces*] (noting that food marketing is "massive," and "rapidly expanding" to new mediums)

⁷² FTC Report, *supra* note 42, at ES-2

⁷³ *Id.*

⁷⁴ *Id.* at ES-2, ES-5; Christine Lagorio, *Play It Again: Advergaming*, CBS NEWS, Feb. 11, 2009, http://www.cbsnews.com/2100-18563_162-2808272.html.

licensed characters that appeal to children and adolescents.”⁷⁵ Celebrities—“actors, athletes, singers, and musical groups,” are hired to promote products.⁷⁶ In addition, many of these expenditures go to digital advertisements, where the companies, as well fellow consumers, email and text message other consumers, and “word of mouth/viral marketing” from consumer to consumer.⁷⁷ Food companies also sponsor events such as local fairs, performances at malls and retail sites, concerts, athletic events, and circuses.⁷⁸

Advertisements thus populate all aspects of consumers’ lives. As demonstrated through Warhol’s representation of food products, the sheer proliferation of food advertisements overwhelms the viewer and renders it nearly impossible for him/her to approach advertising with a critical eye. In this way, ubiquity of food advertising has created a world in which it is nearly impossible to draw a line between what is propaganda and what is reality. As both Warhol and Gursky explore in their works, how the viewer perceives his/her reality is thus deeply influenced, if not co-opted, by the way in which advertisements represent reality. Moreover, the methods through which food manufacturers advertise are no longer limited to traditional explicit forms of advertisements. Instead, in many cases, the mediums through which food manufacturers advertise are not those that the viewer would register as advertisement.⁷⁹ The *Pelman* court’s emphasis or reliance on the idea that outside, individual experiences influence one’s decision to eat at McDonald’s more than or at least as much as ordinary

⁷⁵ FTC Report, *supra* note 42, at ES-2

⁷⁶ *Id.* at ES-6

⁷⁷ *Id.* at ES-2

⁷⁸ *Id.*

⁷⁹ *See generally*, White House Task Force Report, *supra* note 21, FTC Report, *supra* note 42

advertisements thus ignores the degree to which advertising is inextricably intertwined with and indistinguishable from real life experiences.

This effect is demonstrated by the rise of product placements, the use of food advertisements in movies, television shows, and video games. For example, Walt Disney Pictures' *Herbie: Fully Loaded* "has been described as 'a product-placement movie gone wild,'" ⁸⁰ showing characters eat and drink particular brands of food in nearly every scene. Similarly, in the recent *Spider-Man* movie, "Spider-Man uses his web-spinning power to retrieve a Dr. Pepper."⁸¹ On television shows such as *The Simpsons* and *Family Guy*, product placement is usually achieved by having "a character drinking a soda or offering a can to another character, the can or bottle appearing on a table or a refrigerator shelf, a character mentioning the product in dialogue, or a product logo appearing on a T-shirt or other item, such as a cooler."⁸² Further in video games "[a]dvertising is seamlessly integrated into games [and] takes many forms: billboards, posters, branded messages on delivery trucks and computer screens."⁸³

Like the viewer of Warhol's thirty-two soup cans who ceases to see the individual aspects of each canvas and thus forgets that this is not an exact replica but that an artist has crafted the cans on the canvas, the viewer of *Family Guy* doesn't process that this is an artificial advertisement for a certain product. Instead, the viewer passively accepts the way the product is represented (as delicious or cool) in the television show, unable to grasp the artificiality of the presentation as Gursky urges us to do. Products are seamlessly integrated into the show we are watching and "fit[] with the story in such a

⁸⁰ Campbell, *supra* note 38, at 489

⁸¹ *Id.*

⁸² FTC Report, *supra* note 42, at 49

⁸³ Campbell, *supra* note 38, at 454 (internal citations omitted)

way as to make us forget that it is there to persuade us.”⁸⁴ Studies have shown that in such scenarios “audiences are less skeptical and more receptive because product placement is not perceived as an advertisement.”⁸⁵ The product is then seamlessly woven into the viewer’s reality. Research has found that “[c]onsumers simply search internally for information and choose among recalled brands. If the placement of brands and products in a motion picture creates more top-of-the-mind awareness or moves the brand into the child’s evoked set, marketers have succeeded in their promotional efforts.”⁸⁶

Consistent with the thesis of the passive viewer in the “society of spectacle,” this research demonstrated that “explicit memory does not play a significant role in choice.”⁸⁷ For example, researchers conducted a study in which some children were shown a television show that contained product placements for Pepsi, overwhelming choose Pepsi when afterwards they were given the choice of drinking Coke or Pepsi.⁸⁸ A control group, which had not watched the television show, chose Coke when offered the same choice, which at the time had a significantly greater market share than Pepsi.⁸⁹ This study not only demonstrated the “clear effect of product placement upon children’s incidental

⁸⁴ John A. McCarty, *Product Placement: The Nature of the Practice and Potential Avenues of Inquiry*, in *THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION* (L.J. Shrum ed. 2004)

⁸⁵ See Moonhee Yang, et al., *Mental Models for Brand Placement*, in *THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION* (L.J. Shrum Ed. 2004).

⁸⁶ Campbell, *supra* note 38, at 482 (citing Stacy M. Vollmers, *The Impact on Children of Brand and Product Placements in Films* 90, at 91 (Aug. 31, 1995) (unpublished Ph.D. dissertation, Florida State University) (on file with University Microfilms, <http://www.umi.com>))

⁸⁷ Campbell, *supra* note 38, at 482-83 (citing Susan Auty & Charlie Lewis, *Exploring Children’s Choice: The Reminder Effect of Product Placement*, 21 *PSYCHOL. & MARKETING* 697, 710 (2004))

⁸⁸ *Id.* (citing Auty, *supra* note 81, at 704-05)

⁸⁹ *Id.* (citing Auty, *supra* note 81, at 704-05)

choice of a drink,” but also that there was “[n]o difference in choice . . . between those who correctly recalled the brand and those who did not.”⁹⁰ Thus, even though the children did not remember seeing Pepsi in the television, their exposure to the advertisement had an effect.⁹¹

Perhaps more than product placement, the use of “product ambassadors” by food manufacturers has blurred the lines between representation and reality, merging interpersonal relationships with product promotions. Food manufacturers have begun to recruit consumers as “product ‘ambassadors’ or ‘connectors,’” who are compensated to hand out promotional materials and engage in both “electronic and non electronic peer-to-peer communications about food products, with the aim of “increase[ing] discussion of a food product or brand among consumers, and to encourage consumers to share branded messages with one another.”⁹²

For example, a candy manufacturer hired snowboarders to be ambassadors and hand out promotional DVDs at snowboarding venues to their peers. In addition, ambassadors are encouraged to send emails about the brand to friends and contribute to “company sponsored blogs and social networking profiles,” as in one flavored milk company which created an “online brand ambassador program with a dedicated website featuring member profiles, message boards, and activity reports.”⁹³ These ambassadors were then awarded “points” redeemable for prizes for “engaging in online and offline

⁹⁰ *Id.* (citing Auty, *supra* note 81, at 708-09)

⁹¹ *Id.* (citing Auty, *supra* note 81, at 708-09)

⁹² FTC Report, *supra* note 42, at ES-5, 41

⁹³ *Id.* at 42

promotional activities for the brand.”⁹⁴ Similarly, a canned soup company created an interactive platform where visitors to the website could “create a personality profile based on their favorite soup flavor” and then send their profile to other users “via AOL or Yahoo instant messenger.”⁹⁵

Advertisements also insert themselves into a potential consumer’s reality, through “cross-promotions.” These cross-promotions keep the potential consumer engaged with a product and control the potential consumer’s exposure to the product. The cross-production model functions such that:

[a] child might first see an ad on television for a food product; the child would then encounter related promotional displays or product packaging in a retail setting or restaurant; the child might receive a related toy or other premium immediately upon purchase of the product or might be directed to the product website to enter a package UPC or other code to participate in sweepstakes etc.; once on the website, the child might interact with the brand through online games” or via e-cards or “send-to-a-friend” viral marketing messages”⁹⁶

For example, in the Ronald McDonald commercial inviting children to create a photograph with him, the advertisement is not only forging a strong connection with the viewer, but also is guiding the consumer to visit the website filled with additional ads, interactive games, and opportunities for viral marketing messages.⁹⁷ McDonald’s has

⁹⁴ *Id.* at 42

⁹⁵ *Id.* at 43 n.69

⁹⁶ FTC Report, *supra* note 42, at ES-4, 27-28. The report found that in 2006 food and beverages were tied to approximately eighty movies, television shows, and animated characters; *see also* Harris, *Licensed Characters*, *supra* note 37, 409-417 (citing a Yale University study that found that between 2006 and 2008 the number of cross-promotions in food products increased by 78%)

⁹⁷ Bruce Horovitz, *Ronald McDonald is reaching out to kids online*, USA TODAY, Mar. 31, 2011, <http://www.usatoday.com/money/industries/food/2011-03-31-ronald-mcdonald-goes-digital.htm>

also used cross-promotion marketing in conjunction with third parties, thus seamlessly inserting its advertising into the consumers day-to-day life. In addition, in 2007 McDonald's ran an *American Idol* cross promotion, in which happy meals came with *American Idol* inspired toys and the opportunity to enter a sweepstakes for tickets to the *American-Idol* season finale.⁹⁸

Like the gallery viewer who becomes a consumer of Warhol's "supermarket," the consumer becomes part of a narrative told by the food manufacturer, and is directed to interact with the brand by playing with certain toys, attending sponsored events, accessing the website, and interacting with peers *about* the product. In the examples above, McDonald's ensures that the viewer of its advertisement is not only frequently exposed various promotions for McDonald's, but also that the viewer literally and figuratively buys into McDonald's message. The consumer who goes on McDonald's website is not only more likely to eat McDonald's but promotes McDonald's by sharing their experience on the website with others and or engaging in the viral marketing messages. Further, websites provide the opportunity for potential consumers to engage with the product. For example, "advergames," popular on food websites, are video games where children can "score with Skittles" or "race with Chips Ahoy," "jump on Laffy Taffy," and are more generally "filled with products like Cheetos [and] Mountain Dew." This interaction encourages the person playing the game to become a consumer: as one ten year old girl interviewed by CBS stated, when games show a particular product, "it makes you want to see it or buy it or something."⁹⁹ The viewer is not only

⁹⁸ Campbell, *supra* note 38, at 454

⁹⁹ Christine Lagorio, *Play It Again: Advergaming*, CBS NEWS, Feb. 11, 2009, http://www.cbsnews.com/2100-18563_162-2808272.html; Similarly, food manufacturers

inundated with advertisements to the point that s/he cannot approach them critically and accepts what they represent as reality, but moreover is transformed into a consumer.

partner with toy and clothing manufacturers to produce pajamas carrying a brand logo, decals with a brand logo to hang in lockers, as well as “race-cars, dolls, and Play-Doh, which children could use to make models of there favorite snack cakes.” Thus, advertisements are integrated into a child’s normal life and routine in way that a child would not process as advertisement. FTC Report, *supra* note 42, at 31, 31 n.64.

V. CONCLUSION

In *Pelman I*, as quoted previously, the court wrote that “[a] person’s choice to eat at McDonald’s and what foods (and how much) he eats may depend on taste, past experience, habit, convenience, location, peer choices, other non-nutritional advertising and cost.”¹⁰⁰ This statement seems to imply that advertisements themselves cannot be the culprit and that personal choice plays a critical role in the decision to (over)eat unhealthy fast food. However, the dominance of “personal choice,” is undercut by an exploration of how, like the Renaissance painters, advertisements are constructed to communicate with their viewers and to make them think and feel in a particular way. Further, applying pop art critique and photographic theory, we see the ways in which advertisements do not simply describe a product, but perform an action on the viewer. Finally, and perhaps most powerfully, we see in a world that is filled with representation, the viewer can no longer separate representation from reality, such that the two fuse together and the world of representation dominates personal choice.

Whether or not the courts take notice, self-regulatory initiatives have left reason for cautious optimism. The Children’s Food and Beverage Advertising Initiative reports that due to citizen group pressure, “thirteen of the largest food and beverage companies—estimated to account for more than two-thirds of the food and beverage television advertising expenditures direct toward children” have “pledg[ed] either not to direct television, radio, print, or Internet advertising to children under 12” or have pledged to

¹⁰⁰ *Pelman VI*, 272 F.R.D. at 95 (alterations in original) (quoting Def.’s Mem. In Opp’n Class Cert. 13 (citing Def.’s Mot. To Strike, Aff. Timothy P. Meyer ¶¶ 2, 4-9, 18))

“limit the use of licensed characters to the promotion of healthier products or lifestyles,”
and stop “seeking product placements in child-directed media.”¹⁰¹

¹⁰¹ FTC Report, *supra* note 42, at ES-7; *see also* Darwin, *supra* note 37, at 334 n.23 (noting that companies that have signed onto the initiative include: McDonald’s USA, Burger King Corp. Cadbury, Campbell Soup Company, Coca-Cola Company, The Hershey Company, Kellogg Company, Kraft Foods Inc., Mars, Inc., Nestle USA, PepsiCo, Inc.), Elaine D. Kolish & C. Lee Peeler, Council of Better Bus. Bureaus, *Hanging the Landscape of Food and Beerage Advertising: The Children’s Food and Beverage Advertising Initiative* (2008), available at http://us.bbb.org/WWWRoot/storage/16/documents/CFBAI/ChildrenF&BInit_Sept21.pdf